



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v.

COMPLETE GENERAL
 CONSTRUCTION COMPANY,

Respondent.

Docket No. 91-2147

ORDER

This matter is before the Commission on a direction for review entered by former Commissioner Donald G. Wiseman on August 24, 1992. The parties have now filed a stipulation and settlement agreement.

Having reviewed the record, and based upon the representations appearing in the stipulation and settlement agreement, we conclude that this case raises no matters warranting further review by the Commission. The terms of the stipulation and settlement agreement do not appear to be contrary to the Occupational Safety and Health Act and are in compliance with the Commission's Rules of Procedure.

Accordingly, we incorporate the terms of the stipulation and settlement agreement into this order, and we set aside the Administrative Law Judge's decision and order to the extent that it is inconsistent with the stipulation and settlement agreement. This is the final order of the Commission in this case. See 29 U.S.C. §§ 659(c), 660(a), and (b).

Stuart E. Weisberg
 Stuart E. Weisberg
 Chairman

Edwin G. Foulke, Jr.
 Edwin G. Foulke, Jr.
 Commissioner

Dated March 25, 1994

Velma Montoya
 Velma Montoya
 Commissioner

Docket No. 91-2147

NOTICE OF ORDER

The attached Order by the Occupational Safety and Health Review Commission was issued and served on the following on March 25, 1994.

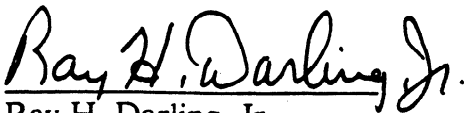
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James Barkley
Administrative Law Judge
Occupational Safety and Health
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FOR THE COMMISSION


Ray H. Darling, Jr.
Executive Secretary



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SECRETARY OF LABOR
Complainant,

v.

COMPLETE GENERAL CONSTRUCTION CO.
Respondent.

OSHRC DOCKET
NO. 91-2147

NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on July 27, 1992. The decision of the Judge will become a final order of the Commission on August 26, 1992 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before August 17, 1992 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.
Ray H. Darling, Jr.
Executive Secretary

Date: July 27, 1992

DOCKET NO. 91-2147

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,
Complainant,

v.

COMPLETE GENERAL
CONSTRUCTION CO.,
Respondent.

OSHRC Docket No. 91-2147

APPEARANCES:

Bruce Scott Goldstein, Esq., Office of the Solicitor, U.S. Department of Labor,
Cleveland, Ohio

Michael S. Holman, Esq., Bricker & Eckler, Columbus, Ohio

Before: Administrative Law Judge James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 et seq.; hereafter called the "Act").

Respondent, Complete General Construction Co. (CGC), at all times relevant to this action, maintained a place of business at the State Route 39 Bridge, over the Black Fork branch of the Mohican River near Lucas, Ohio, where it was engaged in construction (Answer ¶13). Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act (Answer ¶14).

Following a May 22-23, 1991 inspection of its workplace by an Occupational Safety and Health Administration (OSHA) Compliance Officer (CO) (Tr. 80-81), respondent was issued citations and penalties pursuant to the Act (Answer ¶15). By filing a timely notice of contest respondent brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On April 21, 1992, a hearing was held in Cleveland, Ohio, on the contested violations. The parties have submitted briefs on the issues and this matter is ready for disposition.¹

Alleged Violations

Serious citation 1, item 1 alleges:

29 CFR 1926.106(a): Employees working over or near water where the danger of drowning existed, were not provided with U.S. Coast Guard approved life jackets or buoyant work vests:

Work had been done on an unguarded bridge edge at the bridge on State Route 39 over the Black Fork of the Mohigan (sic) River of 85 feet long and 15 ft. high over water 5 ft deep without employees wearing life jackets.

The cited standard provides:

§1926.106 *Working over or near water.* (a) Employees working over or near water, where the danger of drowning exists, shall be provided with U.S. Coast Guard-approved life jacket or buoyant work vests.

Serious citation 1, item 2 alleges:

29 CFR 1926.106(c): Ring buoys with at least 90 feet of line were not provided and readily available for emergency rescue operations:

Work had been done on an unguarded bridge edge at the bridge on State Route 39 over the Mohigan (sic) River of 85 feet long and 15 feet high over water 5 feet deep without having a life ring buoy with 90 ft. of line available.

¹ Respondent attached to its brief as Appendix 1 selected pages from a publication. Respondent did not seek their admission at the hearing, but now seeks to have them considered. Not having been admitted at the hearing, Appendix 1 is disregarded.

The cited standard provides:

(c) Ring buoys with at least 90 feet of line shall be provided and readily available for emergency rescue operations. Distance between ring buoys shall not exceed 200 feet.

Serious citation 1, item 3 alleges:

29 CFR 1926.106(d): A lifesaving skiff was not immediately available at locations where employees were working over or adjacent to water:

Work had been done on an unguarded bridge edge at the bridge on State Route 39 over the Black Fork of the Mohigan (sic) River of 85 feet long and 15 ft. high over water 5 feet deep without having a lifesaving skiff readily available at the site.

The cited standard provides:

(d) At least one lifesaving skiff shall be immediately available at locations where employees are working over or adjacent to water.

Serious citation 1, item 4 alleges:

29 CFR 1926.500(d)(1): Open sided floors or platforms, 6 feet or more above adjacent floor or ground level, were not guarded by a standard railing or the equivalent on all open sides:

Employees had worked on a bridge without having fall protection on the open side of the bridge on State Route 39 over the Black Fork of the Mohigan (sic) River of 85 feet long and 15 feet high over water 5 feet deep.

The cited standard provides:

(d) *Guarding of open-sided floors, platforms, and runways.* (1) Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f)(1)(i) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. . . .

Serious citation 1, item 5 alleges:

29 CFR 1926.701(b): All protruding reinforcing steel, onto and/or into which employees could fall or come against, was not guarded to the hazard of impalement:

Work had been done adjacent and over unprotected protruding rebar at two abutments at each end of the bridge on SR 39 over the Black Fork of Mohigan (sic) River. The rebar was exposed in two openings 2 feet wide by 18 to 42 inches deep by 16 feet long.

The cited standard provides:

Reinforcing steel. All protruding reinforcing steel, onto and into which employees could fall, shall be guarded to eliminate the hazard of impalement.

Alleged Violations of §1926.106(a), (c) and (d)

The facts relating to this standard are not disputed.

The State Route 39 bridge is approximately 85 feet long (Tr. 84), and 12-1/2 feet above the surface of the water (Tr. 74, 169). At the approximate time of the inspection, the water at the middle of the bridge was four and one half feet deep (Tr. 74, 169).² The river was moving (Tr. 60), though the current did not appear to be strong (Tr. 37).

Prior to the CO's arrival at the site, Respondent's employees used saws and a 35 pound jackhammer to remove all the concrete from the edge of the bridge, exposing the rebar skeleton (Tr. 11-14, Ex. C-1). Brian Stevens, one of the jackhammer operators, testified that the job required him to stand at the edge of the concrete surface and lean into the jackhammer (Tr. 14, 86).

Employees working on the bridge edge were not provided with life jackets. Neither ring buoys nor a lifesaving skiff was provided and readily available at the site (Tr. 86).

Respondent admits it failed to comply with the strictures of §1926.106 et seq., but maintains that those standards are inapplicable in the cited circumstances

² James L. Bittinger, Project Supervisor with the Army Corp of Engineers, testified that measurements of the Mohican River taken approximately 3-1/2 miles upstream from the SR 39 bridge and 1/2 mile downstream during the weeks prior and subsequent to the inspection, indicate some fluctuation of the river's depth (Tr. 48-56). The distance of the Corp's measurement stations from the worksite, and the juncture of another stream, the Rocky Fork, with the Mohican River above the lower station (Tr. 62), make it impossible to determine the extent of the noted fluctuations on conditions at CGC's worksite. For purposes of the cited violation, the stipulated depth of four and one half feet with little or no fluctuation shall be assumed.

because four and one half feet of water does not present a drowning hazard. This judge does not agree.

Anthony Giovagnoli and William Kremzar, the investigating CO and a Safety Supervisor with OSHA, respectively, noted that no perimeter or fall protection was provided for employees working on the edge of the bridge (Tr. 16, 84). Both testified that a falling employee could easily be injured and/or lose consciousness in a 12-1/2 foot fall (Tr. 92). The jackhammer could fall with the employee, striking or entangling him (Tr. 92), or the employee could strike his head on broken concrete, which was allowed to fall into the river (Tr. 16, 126). An unconscious or injured employee would not be able to wade out of four and one half feet of water and could drift away and/or drown in the time it would take another worker to wade through up to 40 feet of moving river after him. (Tr. 92, 126).

James Vonn, a safety and health consultant testifying for respondent, stated that he knew of no accidents involving serious injuries or death resulting from a 12-1/2 foot fall into four and one half feet of water (Tr. 145), and that he did not believe the cited standard would be applicable to that depth of water (Tr. 143). However, Vonn did not consider a disabled employee in rendering his opinion. On cross-examination, Vonn admitted that it is possible to drown in four and one half feet of water (Tr. 149) and that an employee falling head first from 12-1/2 feet into that depth could strike bottom and suffer back or neck injuries (Tr. 152-153).

Respondent eventually conceded at the hearing that there was a danger of drowning presented to a disabled employee working alone, against which the standard at §1926.106(a), requiring that buoyant vests be provided, would provide protection (Tr. 174). Respondent continues to maintain, however, that the likelihood of an employee being disabled is remote, and that neither ring buoys nor a lifesaving skiff would significantly reduce such an individual's risk of drowning (Tr. 174).

The undersigned finds that it is not unforeseeable that an employee falling 12-1/2 feet into only four and one half feet of water could strike bottom and be injured or rendered unconscious, and that there is, therefore, a danger of drowning in the

cited circumstances. The Secretary has demonstrated that CGC was in violation of §1926.106.

Respondent admitted the utility of the provision of §1926.106(a) to a disabled employee at trial. Its contention that the provisions of subsections (c) and (d) provide no additional protection against the risk of drowning, i.e. that their violation of those subsections is merely *de minimis*, is rejected.

A violation is *de minimis* when there is technical noncompliance with a standard, but the departure bears such a negligible relationship to employee safety or health as to render inappropriate the assessment of a penalty or the entry of an abatement order. *Cleveland Consolidated, Inc.*, 13 BNA OSHC 1114, 1987-90 CCH OSHD ¶127,829 (No. 84-696, 1987).

In a moving river, a disabled employee could be carried downstream before a wading co-worker could reach him. A lifesaving skiff would allow rapid retrieval of an unconscious and drifting employee. A ring buoy would provide speedier assistance to a conscious, but injured employee. This judge cannot find, therefore, that the required measures bear a negligible relationship to employee safety or health and so cannot find the cited violations *de minimis*.

Submersion of a disabled employee in water presents a substantial probability of death or serious physical harm (Tr. 94), and the cited violations are properly characterized as “serious” under the criteria set forth at §17(k).

Penalty

Respondent is a medium sized company, with about 250 employees (Tr. 98), with no history of prior violations (Tr. 99). Respondent’s safety officer did not visit the job site before the OSHA inspection to ascertain whether conditions merited protective measures, but did not in any other respects demonstrate bad faith (Tr. 98, 171-173). The gravity of the violation is moderated by the depth of the water; the lack of a significant current and that a non-injured employee could be expected to wade out of the river. Only a disabled employee would be subject to a risk of drowning.

Taking into consideration the relevant factors, this judge finds that the proposed penalties of \$3,500.00 per violation are excessive. Penalties of \$750.00 per item will be assessed.

Alleged Violation of §1926.500(d)(1)

It is undisputed that CGC employees worked at the unguarded edge of the SR 39 bridge (Tr. 16, 84). It is stipulated that the bridge was more than six feet above the adjacent Mohican River (Tr. 74).

Respondent maintains that the plain language of the cited standard makes it applicable only to open sided surfaces above "adjacent floor[s] or ground level," and cannot be enforced where the work surface is over water.

In *Sletten Construction Co. 1977-1978 CCH OSHD ¶122,349* (No. 11028, 1977), however, the Commission affirmed a violation of §1926.500(d)(1) based on the cited employer's failure to provide a guardrail on a platform 12 feet above the Yellowstone River where the employer was constructing a cofferdam. This judge is constrained to following the holding in *Sletten* which finds the cited standard applicable to work platforms over water.

The Secretary has shown that CGC was in violation of §1926.500(d)(1) on May 23, 1991. For the reasons set forth above, this judge finds that the violation was "serious," but also for the reasons set forth above that the proposed penalty of \$3,500.00 is excessive. A penalty of \$1,000.00 will be assessed.

Alleged Violation of §1926.701(b)

On May 23, 1991, CO Giovagnoli observed and photographed an open two foot gap³ in the east approach of the bridge where the "end dams" had been hammered out (Tr. 17, 38, 87-88 110; Ex. C-2A, C-2B). A number of 12 to 18 inch pieces of rebar protruded from the ground; a horizontal bar crossed the vertical members four inches from the top. The vertical pieces extended to "slightly below"

³ Tambini's testimony that the gap was covered when he arrived on the site (Tr. 166) is not inconsistent with that of CO Giovagnoli, who stated that Tambini did not arrive until 40 minutes after Giovagnoli initiated the inspection (Tr. 82). Tambini admitted that he had not been at the SR 39 site prior to May 23 (Tr. 166).

the level of the adjacent roadbed on the east and bridge on the west (Tr. 19, 159-162). Employees were required to walk over the gap in the pavement periodically throughout the day in the course of their activities (Tr. 21, 87).

Respondent maintains that the exposed rebar presented no impalement hazard, based on the testimony of James Vonn, who stated that an employee falling in the area of the two foot opening would most likely fall across the gap and not into it, where the rebar was located (Tr. 157-159).

Mr. Vonn's testimony is no more than speculation in this instance. Nothing in his testimony convinces this judge that in the event of a trip and fall accident in the area of the two foot gap, an employee is more likely to bridge the gap with his body than he is to put down a knee, a shoulder or a bracing arm into the unguarded opening.

The Secretary has shown that CGC was in violation of §1926.701(b) on May 23, 1991.

Impalement would likely result in serious bodily injury, and the cited standard is correctly classified as "serious." Because the rebar was partially guarded by location, reducing the probability of injury, and taking into consideration the relevant criteria previously discussed, the proposed penalty of \$1,100.00 is considered excessive. A penalty of \$230.00 will be assessed.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Serious citation 1, item 1, alleging violation of §1926. 106(a) is AFFIRMED and a penalty of \$750.00 is ASSESSED.

Serious citation 1, item 2, alleging violation of §1926. 106(c) is AFFIRMED and a penalty of \$750.00 is ASSESSED.

Serious citation 1, item 3, alleging violation of §1926. 106(d) is AFFIRMED and a penalty of \$750.00 is ASSESSED.

Serious citation 1, item 4, alleging violation of §1926. 500(d)(1) is AFFIRMED and a penalty of \$1,000.00 is ASSESSED.

Serious citation 1, item 1, alleging violation of §1926. 701(b) is AFFIRMED and a penalty of \$230.00 is ASSESSED.


James N. Barkley
Judge, OSHRC

Dated: July 17, 1992